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656186—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 167

LOUIS F. HALL & CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

The opinion of the Circuit Court of Appeals (R. 61–64) is reported at 148 F. 2d 274. The opinions of the District Court (R. 37, 38–39, 43–44) are not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 65) was entered on April 9, 1945. The petition for a writ of certiorari was filed on June 25, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner filed a claim for refund of floor-stock taxes paid under the Agricultural Adjustment Act of 1933. Except for a tabulation showing the ratio between the petitioner's gross sales and gross profits for the years 1927 to 1935, inclusive, the claim contained no evidence that the burden of the tax was not shifted. After the petitioner requested that the claim be withdrawn and marked rejected, the Commissioner rejected the claim and petitioner instituted a suit for refund. The question is whether, in view of the requirements of Section 902 and 903 of the Revenue Act of 1936, the courts below erred in denying recovery to the petitioner on either of the following two grounds:

A. That the court was without jurisdiction to entertain the action;

B. That the admissible evidence was insufficient to establish that petitioner bore the burden of the tax.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations are printed in the Appendix, *infra*, pp. 10–13.

STATEMENT

This is a suit to recover $28,669.36, paid as floor stocks tax during 1933 under the Agricultural Adjustment Act, c. 25, 48 Stat. 31 (R. 2–4), the taxing provisions of which were held unconstitu-

tional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110. The suit is based upon an amended claim for refund (R. 16–20) which was filed on or about September 7, 1937 (R. 3, 61), pursuant to the provisions of Title VII of the Revenue Act of 1936, and which was rejected by the Commissioner of Internal Revenue on January 31, 1939 (R. 25). The amended claim was filed on the official forms prescribed by the appropriate Treasury Regulations, but it did not contain all of the information called for by the Regulations and the instructions (R. 19) printed on the official form. The only information submitted with the claim, other than a statement of the dates and amounts of taxes paid (R. 17), was a tabulation showing the ratio between the taxpayer's gross sales and its gross profits for the years 1927 to 1935, inclusive (R. 20). Under date of January 7, 1939, counsel for the petitioner wrote a letter to the Commissioner, in which the claims of a number of other clients were mentioned, stating that (R. 22):

> We write to inform you that the following P. T. Form 76 cases are withdrawn:
>
> * * * * *
>
> C–18182 Louis F. Hall & Co., Inc. 74 Leonard Street, New York, N. Y.
>
> * * * * *
>
> In our opinion, proof in these cases would be very difficult to establish. Accordingly,

> we are requesting that the foregoing claims be withdrawn and marked rejected.
>
> * * * * *

Under date of January 31, 1939, the Commissioner rejected petitioner's claim for refund in a letter which read in part as follows (R. 25):

> The proof necessary to establish that you bore the burden of the tax for which you claim refund, as required by the provision of law referred to above, has not been submitted. In a letter from Kenneth Carroad, dated January 7, 1939, it is requested that your claim be withdrawn and considered rejected, as it is believed that it would be very difficult to substantiate the facts alleged with respect thereto.
>
> Accordingly, your claim is hereby rejected in full.

The Government filed an answer (R. 5–6) denying the allegations of the complaint, except that the refund claim had been filed, and pleaded as a special defense that the District Court lacked jurisdiction because (1) the claim for refund was insufficient, and (2) the claim for refund had been withdrawn. The Government later moved to dismiss the complaint (R. 6–7) on the ground that it failed to state "a claim upon which relief can be granted, or, in the alternative, for an order granting summary judgment in favor of the defendant and against the plaintiff, together with costs." Affidavits in opposition to the motion were filed (R. 27–36),

but an order of dismissal was entered on December 21, 1943 (R. 37), based upon the same court's decision in a similar case (R. 38–39). A motion for reargument (R. 45) was denied (R. 51). Under date of February 24, 1944, the District Court entered an order granting the Government's motion to dismiss and denying the motion for summary judgment (R. 56–57). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 65), but held that the complaint should have been dismissed on the merits (R. 64).

ARGUMENT

Precisely the same issues are involved in this case as were involved in *Samara* v. *United States*, 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686. Precisely the same arguments are advanced in support of the petition for a writ of certiorari in this case as were advanced in the *Samara* case, and precisely the same cases are relied on as being in conflict with the decision below as were relied on in the *Samara* case. See petition for certiorari, No. 489, October Term 1942. We submit that there is no more reason for the Court to grant certiorari in this case than there was in the *Samara* case, and indeed, as we shall show, there is even less reason in this case.

1. The decision below, like the decision in the *Samara* case, is not necessarily in conflict with

the decision of the Circuit Court of Appeals for the Third Circuit in *Bethlehem Baking Co.* v. *United States,* 129 F. 2d 490. The opinions in that case show clearly that the taxpayer there made a greater effort than did the petitioner here to comply with the Commissioner's regulations governing the filing of claims for refund by submitting an analysis of costs and participating in a conference before the Commissioner at which the entire case was reviewed. See *Bethlehem Baking Co.* v. *United States,* 40 F. Supp. 936 (E. D. Pa.). The decision in the *Bethlehem* case merely approved the introduction of certain additional evidence designed to substantiate the evidence already submitted to the Commissioner. While it is true that in the instant case the court below stated, in effect, that evidence which had not first been submitted to the Commissioner could not be produced in the district court, and the Circuit Court of Appeals for the Third Circuit may be deemed to have rejected that view in its *Bethlehem Baking* opinion, this case is clearly distinguishable on its facts. It is clear from the record that the petitioner cannot produce any direct evidence to prove that it bore the burden of the tax sued for. Affidavits and correspondence filed with the District Court (R. 27–36, 46–55) indicate that the only evidence which could be offered would be unsubstantiated oral statements to the effect that the taxpayer bore

the burden of the tax. Such statements, however, would be mere conclusions. Hence, any supposed conflict with the *Bethlehem Baking* case need not be resolved here, for whatever verbal deviation may be found from the rule there enunciated, the decision of the court below would have to be affirmed.

The decision here is in accord with the same court's earlier decision in the *Samara* case. In neither case did the taxpayer submit any substantial evidence in connection with its refund claim to show that it had borne the burden of the tax. The only evidence submitted here was a schedule showing the ratio between the taxpayer's gross sales and gross profits for the years 1927 to 1935, inclusive (R. 20). There was nothing whatever to show that the reduction in the percentage of gross profits during the period that the tax was in effect was attributable to the tax. The taxpayer's failure to submit to the Commissioner such evidence as it was prepared to offer at the trial of this case cannot be excused on the ground that the Commissioner would not have accepted it as proof that the burden of the tax had not been borne. See *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269.

2. This case, like the *Samara* case, also presents the question of whether the complaint should be dismissed for lack of jurisdiction rather than on the merits, but there is even less reason

for granting further review in this case to answer this question than there was in the *Samara* case, because, since the decision in that case, this Court has decided *Angelus Milling Co.* v. *Commissioner,* No. 610, October Term 1944. The decision in the *Angelus* case plainly indicates that a failure to comply with the requirements of the applicable statute and regulations (Appendix, *infra*, pp. 10–13) governing claims for refund deprives the Court of jurisdiction over a suit brought after the claim is denied.[1] Consequently any modification of the decision below by this Court could not aid the taxpayer.

Moreover, in this case, the taxpayer withdrew its claim for refund (R. 22), and that alone is a sufficient ground upon which the decision below might have been based. Finally, almost three years have elapsed since the denial of the petition for a writ of certiorari in the *Samara* case, and that very fact makes any question relating to suits for the recovery of taxes collected under the Agricultural Adjustment Act less important.

[1] Taxpayer here told the Commissioner that he was making no attempt to establish the proof necessary to sustain the claim (R. 22).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1945.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review [1] in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction

[1] "Board of Tax Appeals (hereinafter referred to as the 'Board')" was inserted in place of "Board of Review" by Section 510 (e) of the Revenue Act of 1942, c. 619, 56 Stat. 798 (7 U. S. C. (Supp. IV) 644).

of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937,[2] a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of proc-

[2] January 1, 1940, was substituted for July 1, 1937, by Section 405 of the Revenue Act of 1939, c. 247, 53 Stat. 862 (7 U. S. C. 645).

essing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (7 U. S. C. 658.)

Treasury Regulations 96, promulgated under Title VII of the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. * * *

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ARTICLE 301. *Claim form prescribed.*—Claims for refund of amounts paid as floor stocks tax shall be filed on P. T. Form 76. (See Chapter II for general provisions relating to all claims.)

U. S. GOVERNMENT PRINTING OFFICE: 1948